Supreme Court, U.S.
FILED

08-60 MAY 7 - 2008

OFFICE OF THE CLERK
William K. Suter, Clerk

No.

IN THE

Supreme Court of the United States

ROGER HOUSE, PETITIONER

v.

UNITED STATES

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ARMED FORCES

PETITION FOR WRIT OF CERTIORARI

JOHN B. WELLS
Counsel of Record

769 Robert Blvd.
Suite 201D
Slidell, LA 70458
985-641-1855

Attorney for Petitioner

CURRY & TAYLOR • (202) 393-4141

QUESTIONS PRESENTED

I Whether the Courts Below Had Jurisdiction to Review the Judge Advocate General's Denial of the Petitioner's Request for a New Trial Based on Timeliness.

II Whether the Courts Below Had Jurisdiction to Review the Judge Advocate General's Denial of the Petitioner's Request for a New Trial Based on Art. 69(d)(2) (10 U.S.C. § 869(d)(2)).

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED i

TABLE OF AUTHORITIES iii

OPINIONS BELOW 1

JURISDICTION 1

RELEVANT PROVISIONS INVOLVED 1

STATEMENT 1

REASONS FOR GRANTING THE PETITION 4

I The Courts Below Had Jurisdiction to Review the Judge Advocate General's Denial of the Petitioner's Request for a New Trial Based on Timeliness. 4

II The Courts Below Had Jurisdiction to Review the Judge Advocate General's Denial of the petitioner's Request for a New Trial Based on Art. 69(d)(2) (10 U.S.C. § 869(d)(2)).19

CONCLUSION 13

APPENDIX

Decision of the United States Court of Appeals for the Armed Forces 1a

Decision of the United States Navy and Marine Court of Criminal Appeals 2a

Decision of the Judge Advocate General of the Navy 7a

Relevant Provisions Involved 10a

TABLE OF AUTHORITIES

Page

CASES

Chemical Mfrs. Ass'n v. U.S. E.P.A., 919 F.2d 158, (DC Cir. 1990) 10
Chevron U.S.A., Inc. v. Nat. Res. Def. Council Inc., 467 U.S. 837 (1984) 10
Connecticut National Bank v. Germain, 503 U.S. 249 (1992) 11
Davis v. Michigan Dept. of Treasury, 489 U.S. 803 (1989) 10
Dew v. United States, 48 M.J. 639 (A. C. C. A. 1998) 12
Holloway v. Jones. 166 F.Supp.2d 1185 (E.D.Mich. 2001) 6
In re Winship, 397 U.S. 358 (1970) 6
McPhail v. United States, 1 M.J. 457 (C.M.A. 1976) 12
Miller v. Marr, 141 F.3d 976 (10th Cir. 1998) 6
Nguyen v. United States, 2001 WL 1488586 (N.M.Ct.Crim.App. 2001) 12
Schlup v. Delo, 513 U.S. 298 (1995) 5,7
Shalala v. Whitecotton, 514 U.S. 268 (1995) 10
Souter v. Jones, 395 F 3d 577 (6th Cir.2005) 6
Transamerica Mortgage Advisors, Inc. v. Lewis, 444 U.S. 11 (1979) 10
United States v. Dettinger, 6 M.J. 505 (A.F.C.M.R.1978) 12
United States v. DuBay, 17 C.M.A. 147, 37 C.M.R. 411 (1967) 5
United States v. Frischholz, 16 U.S.C.M.A. 150, 36 C.M.R. 306 (1966) 12
United States v. Gale, 17 U.S.C.M.A. 40. 37 C.M.R. 304 (1967) 12
United States v. Luke, 63 M.J. 60 (C.A.A.F 2006) 5,6,7
United States v. McGowan, 41 M.J. 406 (C.A.A.F. 1995) 11
United States v. Nguyen, 56 M.J. 252 (C.A.A.F. 2001) 12

STATUTES

10 U.S.C. § 832 2
10 U.S.C. § 869 9
28 U.S.C. § 1254 1
28 U.S.C. § 2241 6

RULES

Rule 13.1 1

OPINIONS BELOW

The Opinion of the Court of Appeals for the Armed Forces is unreported. The decision of the Navy and Marine Corps Court of Criminal Appeals denying relief is also unreported. The decision of the Judge Advocate General of the Navy is unreported.

JURISDICTION

These issues are properly before the Supreme Court of the United States pursuant to 28 U.S.C. §§ 1254, 1651(a) and Rule 10 of the Supreme Court rules which govern the review on Certiorari and for extraordinary relief. The final judgment of the United States Court of Appeals for the Armed Forces was entered on February 14, 2008. The submission for filing is within the 90 day requirement of Rule 13.1 of the Supreme Court Rules. This proceeding does not question the constitutionality of any Act of Congress or any State Legislature. Consequently, the provisions of Rule 29.4(b) and (c) do not apply.

RELEVANT PROVISION INVOLVED (see appendix)

STATEMENT

1. Lieutenant Roger A. House, the petitioner in this case, was assigned to the staff of the Commander, Naval Recruiting Command as the manager for dental programs. He was detached from the Recruiting Command in February 2001, en route to a position as Executive Assistant to the Surgeon General of the Navy. Shortly after his transfer, he was informed that he along with two other officers had been charged with

rape, fraternization and other charges. These claims arose from a reported dalliance with an enlisted female, the evening of his going away party.

2. A group Article 32 investigation[1] was convened on 25-26 May 2001. The Investigating Officer noted that the complaining witnesses' testimony was incredible and that she was successfully impeached by the defense. He recommended that no charges be brought against Lieutenants House and Williams. He recommended fraternization charges be brought against Lieutenant Harris. Subsequently, the Army Crime Lab reported DNA evidence which seemed to implicate petitioner. This new evidence, tested by Mr. Philip Mills, indicated that there was a trace of DNA (skin cells) that might have been come from LT House found on a condom that was located in the trash at LT Harris' home. The DNA was not an exact match with only 10 of 13 loci matching. The General Court-Martial convening authority ignored the recommendations of the Investigating Officer and charged all three officers with rape and a host of mulitiplicious other charges.

3. The complaining witness stated that she was involved in a sexual encounter with the three accused on the night in question. She indicated this was her only sexual experience of that night. An analysis of her panties by the Army Crime Lab revealed traces of semen from a person other than the three accused.

4. Petitioner was tried by a general court-martial entitled *United States v. Roger A. House, Lieutenant (O-3), United States Navy*, tried 23-31 January 2002. The petitioner was acquitted of most of the charges including

---

[1] An Article 32 investigation is governed by 10 U.S.C. § 832 and is the military equivalent of a preliminary examination.

a charge of forcible rape. LT House was convicted, contrary to his pleas, of false swearing, conspiracy to make a false official statement and conduct unbecoming an officer. He was sentenced to pay a fine of $500.00 for two months and to be reprimanded. A timely Art. 69 review was filed. The Judge Advocate General set aside the conviction for false swearing on December 13, 2004. On 28 April, 2005, the convening authority issued his supplemental action. The petitioner filed a petition for extraordinary relief in the nature of a writ of mandamus and a petition for review under Art. 69(D) on 27 July 2005. The petition was denied on 18 August 2005. A timely writ appeal was filed in the Court of Appeals for the Armed Forces on 6 September 2005 and was denied. This court denied certiorari on April 17, 2006. *House v. United States*, 547 U.S. 1072 (2006).

5. After the convening authority's final action, the counsel for Lieutenant House learned that Mr. Mills had been under investigation for allowing contamination during his testing procedures and for falsifying DNA entries. Mills has admitted falsifying at least one DNA entry. The information was included in a memorandum released by the Army on August 25, 2005. Undersigned counsel became aware of the information on September 29, 2005. Subsequently, Mr. Mills and the Army Crime Lab terminated their association.

6. Upon the discovery of new evidence that called the DNA evidence into question, petitioner timely filed a Petition for New Trial on October 4, 2005. It was denied as untimely on August 31, 2006[2] as not being filed within the two year limitation. Petitioner then filed a request for reconsideration on January 16, 2007, noting that the

---

[2] The document was misdated August 31, 2005.

original petition was timely filed within two years of the convening authority's final action on April 28, 2005. The request for reconsideration was denied on September 18, 2007. A petition for extraordinary relief was filed with the court below on December 17, 2007. It was denied on December 20, 2007. A timely writ appeal was filed with the Court of Appeals for the Armed Forces on January 14, 2008 and denied by that court on February 14, 2008.

REASONS FOR GRANTING THE PETITION

I The Courts Below Had Jurisdiction to Review the Judge Advocate General's Denial of the Petitioner's Request for a New Trial Based on Timeliness.

1. Art. 73 of the Uniform Code of Military Justice states in pertinent part:

> At any time within two years after approval by the convening authority of a court-martial sentence, the accused may petition the Judge Advocate General for a new trial on the grounds of newly discovered evidence or fraud on the court.

2. In reviewing the record, the Judge Advocate General refused to consider the undisputed fact that the convening authority's final action was on 28 April 2005. The convening authority's final action was modified once the Art. 69 changed the verdict and set aside one of the convictions. Thus the two year period restarted and the petition was submitted within the two year requirement.

3. In the case of *United States v. Luke*, 63 M.J. 60 (C.A.A.F 2006), the Court of Appeals for the Armed Forces considered evidence concerning Mr. Mills, the forensic examiner whose improprieties are the subject of this petition, five years after the convening authority's action. The *Luke* court further held that the actions of Mr. Mills triggered the requirement for a hearing under *United States v. DuBay*, 17 C.M.A. 147, 37 C.M.R. 411 (1967).[4] In *Luke*, the court below properly found that the matter should be considered even though it was outside of the two year requirement of Art. 73, because the conviction was not final. Like the case in *Luke*, petitioner's conviction was not final. At the time that the Petition for New Trial was filed, there was a writ appeal pending before the Court of Appeals for the Armed Forces.

4. Additionally, relief is warranted because this court has found that the due process clause of the United States Constitution forbids the punishment of an innocent person. *Schlup v. Delo*, 513 U.S. 298, 324-29 (1995). Not allowing a person to go forward with an actual innocence claim, because of a procedural time

---

[4] In an unpublished action dated March 9, 2007, the Court of Appeals for the Armed Forces ordered the following action on the *Luke* case:

> On further consideration of the supplemental issue, the Court has determined that it would be appropriate to remand the case to the Navy-Marine Corps Court of Criminal Appeals for further consideration in light of the findings in the *Dubay* hearing. Accordingly, it is ordered that the Hearing Notice issued February 5, 2007, is hereby vacated, and that the case is remanded to the United States Navy-Marine Corps Court of Appeals for further consideration in light of the findings of the *Dubay* hearing.

limitation constitutes cruel and unusual punishment under the Eighth Amendment to the Constitution. *Holloway v. Jones.* 166 F.Supp.2d 1185 (E.D.Mich. 2001). Actual innocence should be a basis for tolling the statute of limitations contained in Art. 73. Indeed, as Justice Harlan once said:

> [C]oncern about the injustice that results from the conviction of an innocent person has long been at the core of our criminal justice system. That concern is reflected ... in the "fundamental value determination of our society that it is far worse to convict an innocent man than to let a guilty man go free."

In re Winship, 397 U.S. 358, 372 (Harlan, J., concurring).

5. Even if the convening authority's action had not been less than two years prior to its filing, the court below should have imposed the doctrine of equitable tolling on Article 73 and directed the Navy court and the Judge Advocate General to order a new trial or at least consider the merits of the case in light of *Luke, supra.* Although not addressed by the military courts, it is instructional to refer to the provisions of the Antiterrorism and Effective Death Penalty Act (AEDPA) codified at 28 U.S.C. § 2241. This law imposes a one year statute of limitations on post conviction relief brought pursuant to the writ of habeas corpus. 28 U.S.C. § 2241(d)(1).

6. Other Federal courts have recognized the equitable tolling of the AEDPA when the petitioner can make a colorable case of actual innocence. *Souter v. Jones*, 395 F.3d 577, 602 (6th Cir.2005). *See, also, Miller v. Marr*, 141 F.3d 976, 978 (10th Cir.), *cert. denied*, 525 U.S. 891 (1998). In order to demonstrate actual innocence in a

collateral proceeding, a petitioner must present "new reliable evidence that was not presented at trial" and "show that it is more likely than not that no reasonable juror would have found [him] guilty beyond a reasonable doubt." *Schlup v. Delo*, 513 U.S. at 299, 327-28. Based on the holding in *Luke*, *supra.*, it is obvious that the petitioner meets both prongs of the *Schlup* test and the courts below should have tolled the running of the limitations contained in Art. 73. Thus the court below flaunted not only its own precedent, but the dictates of this Court. Additionally the decision of the court below in this case conflicts with the Sixth Circuit in *Souter* and the Tenth Circuit in *Miller*.

7. In the instant case, the only evidence underlying the conviction was the complaining witness' testimony, which was thoroughly destroyed by the defense, and the DNA evidence. Absent the DNA evidence, a complete acquittal would have probably occurred. Absent the DNA evidence, the Article 32 Investigating Officer found no reasonable basis to go forward with the charges. The case was about honesty, credibility and DNA. If Mills lied at the trial, and this seems likely, then it certainly affected the outcome of the trial.

8. NCIS S/A Dulay, who interviewed LT House, said he appeared to act consistently with others who receive an NCIS summons. He appeared to be forthright and truthful. S/A Dulay testified that he had no personal knowledge that any of the statement was untrue.

9. Mr. Phil Mills' testimony concerning DNA linked LT House to Allen sexually. Initially, Mills testified that there was a strong presence of LT House's epithelial cells on the condom. When presented with his report he claimed to be mistaken and said there was only a trace of cells. He further admitted that there was not an exact

match with LT. House and that the DNA could have come from hundreds of other back males. Oddly enough, Mills testified that Allen's DNA was on two condoms although she had previously testified that only House had penetrated her.

10. The evidence showed that LT House was a truthful person whose credibility was high and that Allen was an untruthful person whose credibility was low. The sole link between the two was the supposed trace of epithelial cells that might have belonged to LT House on a condom along with her more significant presence. Whether LT House touched this condom a week earlier or a week later, or in light of more recent revelations whether he touched it at all is unknown. The testimony showed that LT Harris kept a messy house and did not clean it often. LT House, or another black male who was not tested, may have picked up the condom to throw it away. Or it may have been a more benign and freakish cross-contamination from something else that LT House had touched. Such cross-contamination happened during the anthrax attack in 2001. Notably Mills could not eliminate that as a possibility. Significantly, Mills had been reprimanded for allowing contamination in 2004.

11. The bottom line is that the DNA evidence does not make sense. It never did. The statements of the three Lieutenants were taken independently without possibility of collusion and corroborated each other on the major points. The complaining witness' story was inconsistent and did not agree with previous versions. The evidence, at best, could not eliminate LT House. Nor could it eliminate thousands of other black males.

12. Thus petitioner has met the *Schlup v. Delo* standard and made a colorable if not conclusive showing

of actual innocence. At a minimum, the courts below should have ordered a *Dubay* hearing as they did in *Luke*. The more appropriate course of action would have been for the court below be to exercise its supervisory jurisdiction over the Judge Advocate General and order a new trial.

13. Granting a new trial at this stage of proceedings is warranted by the facts and the critical new evidence concerning the DNA testing that was not known at trial. As the Investigating Officer noted, without the DNA evidence there was no basis to even refer charges against LT House, let alone to support a conviction. Courts are empowered to correct injustice and this case is a miscarriage that cries out for relief.

14. In the instant case, the evidence used to convict petitioner was highly questionable. It is probable that the outcome of his trial would have been different if Mr. Mills shenanigans had been known. This court and the other federal circuits have held that a defendant has the right to a fair trial and to due process of law. Granting a new trial will promote that right.

II The Courts Below Had Jurisdiction to Review the Judge Advocate General's Denial of the petitioner's Request for a New Trial Based on Art. 69(d)(2) (10 U.S.C. § 869(d)(2)).

1. The court below summarily denied the writ appeal with no basis for its decision. The Navy and Marine Corps Court of Criminal Appeals at least provided a written opinion to give this court some insight into their thoughts. In that opinion, the Navy court correctly notes that jurisdiction does not lie under Article 66, then discusses and rejects potential jurisdiction under Art.

69(d) While Art. 69(d)(1) does require referral by the JAG, Article 69(d)(2) allows review of the JAG's action.

2. By the wording of the statute, Art. 69(d)(2) gives an independent basis for jurisdiction to the military courts to review the actions of the Judge Advocate General taken pursuant to Art. 69(b). While subsection (1) requires certification by the Judge Advocate General, subsection (2) allows the review of "any action taken by the Judge Advocate General."

3. It is well settled that when the wording of a statute is clear, "that is the end of the matter." *Chevron U.S.A., Inc. v. Natural Res. Def. Council Inc.*, 467 U.S. 837, 842-43 (1984). The court "relies on a common sense consideration of the words" to determine a statute's clarity. *Shalala v. Whitecotton*, 514 U.S. 268, 277 (1995).

4. Additionally, it is fundamental that the words of a statute must be read in their context and with a view to their place in the overall statutory scheme. *Davis v. Michigan Dept. of Treasury*, 489 U.S. 803, 809 (1989). It is an elemental canon of statutory construction "that where a statute expressly provides a particular remedy or remedies, a court must be chary of reading others into it." *Transamerica Mortgage Advisors, Inc. v. Lewis*, 444 U.S. 11, 19 (1979). Courts must consider whether Congress has spoken directly to the precise question at issue by looking to particular statutory language as well as language and design of statute as whole. The intent of Congress must be given effect, if the intent is clear. *Chemical Mfrs. Ass'n v. U.S. E.P.A.*, 919 F.2d 158, (DC Cir. 1990).

5. The same holds true for statutory construction within the military system. "If the statute is clear and unambiguous, a court may not look beyond it but must

give effect to its plain meaning, unless to do so would produce, absurd results, or bring about a result completely at variance, with the statutory purpose." *United States v. McGowan*, 41 M.J. 406, 413 n. 4 (C.A.A.F. 1995) (internal quotation marks and citation omitted). The bottom line is that a Congressional statute means what it says. *Connecticut National Bank v. Germain*, 503 U.S. 249, 253-54 (1992). Here, in rejecting jurisdiction under Art. 69(d)(2) the courts below repudiated the canons of statutory constriction embraced by this Court and all of the Courts of Appeal.

6. It appears from the plain language of the statute that the Congress has indeed specified two separate, distinct and independent remedies in Art. 69(d). The separate provisions make sense. Subsection (1) allows the Judge Advocate General to certify an issue prior to his final decision. This allows the Judge Advocate General to seek the equivalent of a declaratory judgment from the military court of criminal appeals. Subsection (1) applies only to the Judge Advocate General and gives him one right of action. Subsection (2) gives a second and independent right of action to the accused in the case. In other words the two sections when read harmoniously *in pari materia*, give rights of action to both the Judge Advocate General and the accused. Each subsection standing alone, gives only one party a right of action. The courts below should have given deference to the plain meaning of the statute. They failed to do so in contravention of the canons of statutory construction followed by this court and the other Courts of Appeal.

7. Additionally, contrary to the findings, of the Navy court in this case, Art. 69(d)(1) does grant potential jurisdiction. In an unpublished decision, *Nguyen v.*

United States, 2001 WL 1488586 (N.M.Ct.Crim.App. 2001), the Navy court below found sufficient potential jurisdiction to deny a writ on the merits. In granting the writ appeal, the court below did not question its jurisdiction. *United States v. Nguyen*, No. 02-8006/MC, 56 M.J. 252 (C.A.A.F. December 21 2001).

8. The Court of Military Appeals has held that it has the authority to issue extraordinary writs, *United States v. Frischholz*, 16 U.S.C.M.A. 150, 36 C.M.R. 306, (1966) and that it has general supervisory power over the administration of military justice. *United States v. Gale*, 17 U.S.C.M.A. 40, 42, 37 C.M.R. 304, 306 (1967). Additionally, a Court of Criminal Appeals exercises general supervisory power over the administration of military justice within its service. *United States v. Dettinger*, 6 M.J. 505 (A.F.C.M.R.1978), *rev'd in part, aff'd in part*, 7 M.J. 216 (C.M.A.1979).

9. Not only does *Dew v. United States*, 48 M.J. 639 (A. C. C. A. 1998) authorize a military court of criminal appeals to exercise extraordinary relief jurisdiction over the Judge Advocate General, the issue has also been sustained in *McPhail v. United States*, 1 M.J. 457, 463 (C.M.A. 1976). In a case where the Judge Advocate General improperly refused to grant relief, the Court of Military Appeals issued a writ directing him to vacate the convictions.

10. The Court of Appeals for the Armed Forces erred in not rejecting the finding of the Navy court that they lacked jurisdiction under Art. 69(d)(2). They should have granted the writ and remanded the matter for a rehearing on the merits. By failing to do so, they ignored the canons of statutory construction as mandated by the precedents of this Court and various federal Circuits as

delineated herein. Consequently, this Court should grant the petition for certiorari or in the alternative extraordinary relief.

CONCLUSION

For the reasons delineated herein, petition prays that a writ of certiorari be issued to the United States Court of Appeals for the Armed Forces.

Respectfully Submitted,
John B. Wells
Counsel of Record
769 Robert Blvd. Suite 201D
Slidell, LA 70458
985-641-1855
985-649-1536 (fax)
JohnLawEsq@msn.com

USCA Misc Dkt No 08-8006/NA
Crim. App. Dkt. No.200101561
United States Court of Appeals
for the Armed Forces
Washington, D. C. 20442-001

UNITED STATES
Appellee

v.

ROGER A. HOUSE
Appellant

ORDER

On consideration of THE WRIT-APPEAL PETITION, IT IS, BY THE Court, this 14th day of February 2008.

ORDERED:

That said petition is hereby denied.

For the Court,
/s/ William A. DeCicco
Clerk of the Court

NMCCA No.200101561
UNITED STATES NAVY-MARINE CORPS COURT OF CRIMINAL APPEALS

GENERAL COURT MARTIAL

ROGER A. HOUSE
Lieutenant (O-3)
U. S. Navy (Retired)
Petitioner

v.

Judge Advocate General
of the Navy

and

United States
Respondents

OPINION AND ORDER

The petitioner seeks extraordinary relief in the nature of a writ of mandamus, setting aside the findings of guilty in his general court-martial, and ordering a new trial.

Contrary to his pleas, the petitioner was convicted by a general court-martial, comprised of members, of conspiracy to make a false official statement, conduct unbecoming an officer and false swearing, in violation of Articles 81, 133 and 134, Uniform Code of Military Justice , 10 U.S.C. §§ 881, 933 and 934. On 31 January 2002, the petitioner was sentenced to forfeit $500. pay per month for two

months and a letter of reprimand. On 13 December 2002, the convening authority approved the sentence as adjudged and ordered it executed.

Pursuant to Article 69(a), UCMJ, the appellant's case was reviews by the Judge Advocate General of the Navy. On 13 December 2004, the Judge Advocate general (JAG) set aside the finding of guilty to Specification 2 of Additional charge II (false swearing) and reassessed the sentence. Upon reassessment, the JAG declined to modify the approved sentence, finding that "even if no error had occurred at trial, the sentence would have been at least of the same magnitude as the sentence adjudged." Subsequently, by letter dated 3 March 2005, the JAG directed the convening authority to issue a supplemental court[-martial promulgating order in accordance with section 0155 of the Manual of the Judge Advocate General, Judge Advocate General Instruction 5800.7D (15 March 2004). The convening authority did so on 28 April 2005.

On 27 July 2005, the petitioner filed a petition for extraordinary relief in the nature of a writ of mandamus, seeking review of his case by this court under Art. 69(d), UCMJ. This court denied the petition on 18 August 2005. The petitioner then appealed that denial to our superior court which denied the writ-appeal petition on 12 December 2005.

On 3 October 2005, while his writ-appeal petition was pending before our superior court, the petitioner filed a petition for new trial pursuant to Art. 73, UCMJ. On 31 August 2005, the JAG denied the petition on the grounds it was untimely.[1]

---

[1] We note that in advancing his argument that his petition for a new trial was in fact timely filed, the petitioner incorrectly characterizes the 28 April 2005 supplemental court-martial order

The petitioner now asks us to review the JAG's denial of his petition for a new trial, to set aside the findings of guilty, and to order a new trial.

The All Writs Act, 28 U.S.C. § 1651(a), does not confer jurisdiction, but rather authorizes certain extraordinary remedies to be used in aid of already existing or potential jurisdiction. *Clinton v. Goldsmith*, 526 U.S. 529, 534-35 (1999); *Lemoine* V. *Baker*, 36 M.J. 86, 89 (C.A.A.F. 1992). . In this case, there is no statute that confers either actual or potential jurisdiction over the petitioners case on this court.[2]

There is no question this court does not have jurisdiction to review the petitioners case under Article 66, UCMJ, as his sentence was below the jurisdictional limits of that article. Neither does Article 73, UCMJ, give this court jurisdiction to review the petitioners court—martial, his petition f or a new trial, or the JAG's decision on his petition for a new trial.[3]

---

as a new action by the convening authority, In fact there is only one action by the convening authority in this case and that action was taken on 13 December 2002. The 28 April 2005 supplemental court-martial order merely promulgated the JAG's decision in the case.

[2] The petitioner cites Article 73, UCMJ, 28 U.S.C. § 1651(a) (All Writs Act), and CCA Rule 2 as his jurisdictional basis. As noted above, the All Writs Act does not confer jurisdiction. Likewise, neither can a procedural rule confer jurisdiction on this court. CCA Rule 2(c).

[3] While Article 73, UCMJ, requires the JAG to refer a petition for a new trial to this court for action *if* the petitioners case is pending before the court, this petitioners case was not pending before the court at the time of his petition for a new trial. Accordingly, Article 73, UCMJ, did not require the JAG to refer the petition to this court for action.

This court also lacks jurisdiction to review the petitioners court-martial under Article 69(d), UCMJ, as that statute only grants jurisdiction over courts-martial that are both subject to action by the JAG under Article 69, UCMJ, **and** sent to us by the JAG. Obviously, this case has not been sent to us by the JAG. Further, while the possibility of a future referral under Article 69(d) might, in an appropriate case, provide potential jurisdiction, permitting this court to exercise All Writs Act authority, this case is not such a case. Here, the petitioners case is already final, *see* RULE FOR COURTS-MARTIAL 1208 (A) (2) (B) , MANUAL FOR CORTS-MARTIAL UNITED STATES, (2005 ed.), and has never been referred to us under Article 69, UCMJ. In this case, therefore, the court does not have *potential* Article 69, UCMJ, jurisdiction that could justify use of the All Writs Act.

We see no other basis for actual or potential jurisdiction over the petitioners court-martial.[4] Because we lack jurisdiction over the petitioners court-martial, we are without authority to issue the requested writ.

It is, therefore, by the Court, this 20th day of December 2007,

---

[4] We are not persuaded that our superior courts decision in *United States v. Luke*, 63 M.J. 60 (C.A.A.F. 2006), confers jurisdiction on us to review the JAG's decision to deny the petitioner a new trial. First, jurisdiction was not an issue in *Luke*. Second, *Luke* did not directly concern a petition for a new trial; rather the question was whether the Court of Appeals could affirm the findings *on direct appeal* where the appellant had raised a material question of fact about the reliability of the verdict. *Id.* at 63.

ORDERED:

That the Petition for Extraordinary Relief in the Nature of Writ of Mandamus is denied.

For the Court,

R.H. TROIDL

Clerk of Court
20 Dec 2007

Copy to:
NMCCA (71)
John Wells by Fax (985-649-1536)
45
46
02

DEPARTMENT OF THE NAVY
OFFICE OF THE JUDGE ADVOCATE GENERAL
1322 PATTERSON AVENUE SE SUITE 3000
WASHINGTON NAVY YARD DC 20374-5066

IN REPLY
REFER TO
5814
Ser. 40.2/0302
December 13, 2004

NMCMR NO. 200300
MJR NO. 69A-03-035

IN THE OFFICE OF THE
JUDGE ADVOCATE GENERAL OF THE NAVY

UNITED STATES

v

ROGER A. HOUSE
LIEUTENANT (O-3)
MEDICAL SERVICE CORPS ,
UNITED STATES NAVY

Examination pursuant to Article 69(a), UCMJ, of the general court-martial convened by Commander Navy Recruiting Command, Millington, Tennessee

Sentence adjudged: 31 January 2002

The record of trial in the foregoing case has been examined in accordance wit Article 69(a), Uniform Code of Military Justice, 10 U.S.C. § 869(a). The accused's

conviction to Specification 2 of Additional Charge II is unsupported in law and is set aside. The sentence is accordingly reassessed, but no modification of the sentence is warranted given the seriousness of the remaining offenses of which the accused was found guilty.

Even if no error had occurred at trial, the sentence would have been at least of the same magnitude as the sentence adjudged. *United States v. Sales*, 22 M.J. 305, 307-08 (C.M.A. 1986). No other part of the findings or sentence is found to be unsupported in law. And further reassessment of the sentence is not appropriate.

J. E. McPherson
Rear Admiral. JAGC, U. S. Navy
Judge Advocate General

NMCMR NO. 200300855
IN THE OFFICE OF THE
JUDGE ADVOCATE GENERAL OF THE NAVY
5814
Ser 20/0279
August 31, 2005

UNITED STATES

v

ROGER A. HOUSE
xxx-xx- 2913
LIEUTENANT (O-3)
MEDICAL SERVICE CORPS ,
UNITED STATES NAVY

Examination pursuant to Article 69(a), UCMJ, of the general court-martial convened by Commander Navy Recruiting Command, Millington, Tennessee

Sentence adjudged: 31 January 2002

The petition for new trial in the foregoing case has been examined in accordance with Article 73, Uniform Code of Military Justice, 10 U.S.C. § 873, and Rule for Courts-martial 1210. The petition was not filed within the two-year period provided by statute, and is, therefore untimely. The request for new trial is, therefore, denied.

T.J. Schoeppler
By direction of the Judge Advocate General

TEXT OF PERTINENT CONSTITUTIONAL PROVISIONS, TREATIES, STATUTES, ORDINANCES AND REGULATIONS

10 U.S.C. § 832. Art. 32 U.C.M.J. Investigation

(a) No charge or specification may be referred to a general court-martial for trial until a thorough and impartial investigation of all the matters set forth therein has been made. This investigation shall include inquiry as to the truth of the matter set forth in the charges, consideration of the form of charges, and a recommendation as to the disposition which should be made of the case in the interest of justice and discipline.

(b) The accused shall be advised of the charges against him and of his right to be represented at that investigation by counsel. The accused has the right to be represented at that investigation as provided in > section 838 of this title (article 38) and in regulations prescribed under that section. At that investigation full opportunity shall be given to the accused to cross-examine witnesses against him if they are available and to present anything he may desire in his own behalf, either in defense or mitigation, and the investigating officer shall examine available witnesses requested by the accused. If the charges are forwarded after the investigation, they shall be accompanied by a statement of the substance of the testimony taken on both sides and a copy thereof shall be given to the accused.

(c) If an investigation of the subject matter of an offense has been conducted before the accused is charged with the offense, and if the accused was present at the investigation and afforded the opportunities for representation, cross-examination, and presentation prescribed in subsection (b), no further investigation of that charge is necessary under

this article unless it is demanded by the accused after he is informed of the charge. A demand for further investigation entitles the accused to recall witnesses for further cross-examination and to offer any new evidence in his own behalf.

(d) If evidence adduced in an investigation under this article indicates that the accused committed an uncharged offense, the investigating officer may investigate the subject matter of that offense without the accused having first been charged with the offense if the accused--

(1) is present at the investigation;

(2) is informed of the nature of each uncharged offense investigated; and

(3) is afforded the opportunities for representation, cross-examination, and presentation prescribed in subsection (b).

(e) The requirements of this article are binding on all persons administering this chapter but failure to follow them does not constitute jurisdictional error.

10 U.S.C. § 866. Art. 66 U.C.M.J. Review by Court of Criminal Appeals

(a) Each Judge Advocate General shall establish a Court of Criminal Appeals which shall be composed of one or more panels, and each such panel shall be composed of not less than three appellate military judges. For the purpose of reviewing court-martial cases, the court may sit in panels or as a whole in accordance with rules prescribed under subsection (f). Any decision of a panel may be reconsidered by the court sitting as a whole in accordance with such rules. Appellate military judges who are assigned to a Court of Criminal Appeals may be commissioned officers or

civilians, each of whom must be a member of a bar of a Federal court or of the highest court of a State. The Judge Advocate General shall designate as chief judge one of the appellate military judges of the Court of Criminal Appeals established by him. The chief judge shall determine on which panels of the court the appellate judges assigned to the court will serve and which military judge assigned to the court will act as the senior judge on each panel.

(b) The Judge Advocate General shall refer to a Court of Criminal Appeals the record in each case of trial by court-martial--

(1) in which the sentence, as approved, extends to death, dismissal of a commissioned officer, cadet, or midshipman, dishonorable or bad-conduct discharge, or confinement for one year or more; and

(2) except in the case of a sentence extending to death, the right to appellate review has not been waived or an appeal has not been withdrawn under section 861 of this title (article 61).

(c) In a case referred to it, the Court of Criminal Appeals may act only with respect to the findings and sentence as approved by the convening authority. It may affirm only such findings of guilty, and the sentence or such part or amount of the sentence, as it finds correct in law and fact and determines, on the basis of the entire record, should be approved. In considering the record, it may weigh the evidence, judge the credibility of witnesses, and determine controverted questions of fact, recognizing that the trial court saw and heard the witnesses.

(d) If the Court of Criminal Appeals sets aside the findings and sentence, it may, except where the setting

aside is based on lack of sufficient evidence in the record to support the findings, order a rehearing. If it sets aside the findings and sentence and does not order a rehearing, it shall order that the charges be dismissed.

(e) The Judge Advocate General shall, unless there is to be further action by the President, the Secretary concerned, the Court of Appeals for the Armed Forces, or the Supreme Court, instruct the convening authority to take action in accordance with the decision of the Court of Criminal Appeals. If the Court of Criminal Appeals has ordered a rehearing but the convening authority finds a rehearing impracticable, he may dismiss the charges.

(f) The Judge Advocates General shall prescribe uniform rules of procedure for Courts of Criminal Appeals and shall meet periodically to formulate policies and procedure in regard to review of court-martial cases in the offices of the Judge Advocates General and by Courts of Criminal Appeals.

(g) No member of a Court of Criminal Appeals shall be required, or on his own initiative be permitted, to prepare, approve, disapprove, review, or submit, with respect to any other member of the same or another Court of Criminal Appeals, an effectiveness, fitness, or efficiency report, or any other report or document used in whole or in part for the purpose of determining whether a member of the armed forces is qualified to be advanced in grade, or in determining the assignment or transfer of a member of the armed forces, or in determining whether a member of the armed forces should be retained on active duty.

(h) No member of a Court of Criminal Appeals shall be eligible to review the record of any trial if such member

served as investigating officer in the case or served as a member of the court-martial before which such trial was conducted, or served as military judge, trial or defense counsel, or reviewing officer of such trial.

10 U.S.C. § 869. Art. 69 U.C.M.J. 69. Review in the office of the Judge Advocate General

(a) The record of trial in each general court-martial that is not otherwise reviewed under section 866 of this title (article 66) shall be examined in the office of the Judge Advocate General if there is a finding of guilty and the accused does not waive or withdraw his right to appellate review under section 861 of this title (article 61). If any part of the findings or sentence is found to be unsupported in law or if reassessment of the sentence is appropriate, the Judge Advocate General may modify or set aside the findings or sentence or both.

(b) The findings or sentence, or both, in a court-martial case not reviewed under subsection (a) or under section 866 of this title (article 66) may be modified or set aside, in whole or in part, by the Judge Advocate General on the ground of newly discovered evidence, fraud on the court, lack of jurisdiction over the accused or the offense, error prejudicial to the substantial rights of the accused, or the appropriateness of the sentence. If such a case is considered upon application of the accused, the application must be filed in the office of the Judge Advocate General by the accused on or before the last day of the two-year period beginning on the date the sentence is approved under section 860(c) of this title (article 60(c)), unless the accused establishes good cause for failure to file within that time.

(c) If the Judge Advocate General sets aside the findings or sentence, he may, except when the setting

aside is based on lack of sufficient evidence in the record to support the findings, order a rehearing. If he sets aside the findings and sentence and does not order a rehearing, he shall order that the charges be dismissed. If the Judge Advocate General orders a rehearing but the convening authority finds a rehearing impractical, the convening authority shall dismiss the charges.

(d) A Court of Criminal Appeals may review, under section 866 of this title (article 66)--

(1) any court-martial case which (A) is subject to action by the Judge Advocate General under this section, and (B) is sent to the Court of Criminal Appeals by order of the Judge Advocate General; and

(2) any action taken by the Judge Advocate General under this section in such case.

(e) Notwithstanding section 866 of this title (article 66), in any case reviewed by a Court of Criminal Appeals under this section, the Court may take action only with respect to matters of law.

10 U.S.C. § 873. Art. 73. Petition for a new trial

At any time within two years after approval by the convening authority of a court-martial sentence, the accused may petition the Judge Advocate General for a new trial on the grounds of newly discovered evidence or fraud on the court. If the accused's case is pending before a Court of Criminal Appeals or before the Court of Appeals for the Armed Forces, the Judge Advocate General shall refer the petition to the appropriate court for action. Otherwise the Judge Advocate General shall act upon the petition.

28 U.S.C.A. § 1254. Courts of appeals; certiorari; certified questions

Cases in the courts of appeals may be reviewed by the Supreme Court by the following methods:

(1) By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree;
(2) By certification at any time by a court of appeals of any question of law in any civil or criminal case as to which instructions are desired, and upon such certification the Supreme Court may give binding instructions or require the entire record to be sent up for decision of the entire matter in controversy.

28 U.S.C.A. § 1651(a). Writs.

The Supreme Court and all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law.

28 U.S.C.A. § 2241. Power to grant writ

(a) Writs of habeas corpus may be granted by the Supreme Court, any justice thereof, the district courts and any circuit judge within their respective jurisdictions. The order of a circuit judge shall be entered in the records of the district court of the district wherein the restraint complained of is had.
(b) The Supreme Court, any justice thereof, and any circuit judge may decline to entertain an application for a writ of habeas corpus and may transfer the application for hearing and determination to the district court having jurisdiction to entertain it.
(c) The writ of habeas corpus shall not extend to a prisoner unless—
(1) He is in custody under or by color of the authority of the United States or is committed for trial before some

court thereof; or

(2) He is in custody for an act done or omitted in pursuance of an Act of Congress, or an order, process, judgment or decree of a court or judge of the United States; or

(3) He is in custody in violation of the Constitution or laws or treaties of the United States; or

(4) He, being a citizen of a foreign state and domiciled therein is in custody for an act done or omitted under any alleged right, title, authority, privilege, protection, or exemption claimed under the commission, order or sanction of any foreign state, or under color thereof, the validity and effect of which depend upon the law of nations; or

(5) It is necessary to bring him into court to testify or for trial.

(d) Where an application for a writ of habeas corpus is made by a person in custody under the judgment and sentence of a State court of a State which contains two or more Federal judicial districts, the application may be filed in the district court for the district wherein such person is in custody or in the district court for the district within which the State court was held which convicted and sentenced him and each of such district courts shall have concurrent jurisdiction to entertain the application. The district court for the district wherein such an application is filed in the exercise of its discretion and in furtherance of justice may transfer the application to the other district court for hearing and determination.

(e)(1) No court, justice, or judge shall have jurisdiction to hear or consider an application for a writ of habeas corpus filed by or on behalf of an alien detained by the United States who has been determined by the United States to have been properly detained as an enemy

combatant or is awaiting such determination.

(2) Except as provided in paragraphs (2) and (3) of section 1005(e) of the Detainee Treatment Act of 2005 (10 U.S.C. 801 note), no court, justice, or judge shall have jurisdiction to hear or consider any other action against the United States or its agents relating to any aspect of the detention, transfer, treatment, trial, or conditions of confinement of an alien who is or was detained by the United States and has been determined by the United States to have been properly detained as an enemy combatant or is awaiting such determination.